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TO: Hon. Donald DeFronzo, State Senator
Co-Chair, Governor's Task Force on Contracting Reform

Hon. James T. Fleming, Commissioner of Public Works
Co-Chair, Governor's Task Force on Contracting Reform

FROM: Christopher L. Morano, Chief State's Attorney
Chair, Investigations, Enforcement and Compliance Working Group

DATE: August 16, 2004

SUBJECT: Working Group on Investigations, Enforcement and Compliance Draft Report

Enclosed please find the Working Group's Draft Report, Appendix and attached reference materials. The Working Group met on three separate occasions in order to prepare the attached Draft Report. On two of those occasions, the Working Group listened to presentations from several user agencies and from members of the public. Summaries of these presentations are set forth in the attached minutes located in the Appendix to the Draft Report. On its third and final meeting, the Working Group reviewed and reached a consensus on draft language for its recommendations to the Committee Chairs.

As Chair of the Working Group, I would like to take this opportunity to thank all of the Working Group members for their hard work and dedication. Without their efforts, the completion of this Draft Report in such a short time frame would not have been possible. I would also like to specifically thank the Office of the Auditors of Public Accounts for their input into this Draft Report. Although not official members of the Working Group, members of that Office contributed significantly to the debate of issues within our purview.

The Working Group and my office are available to continue their work after your review of the Draft Report. In the meantime, if you have any questions or concerns, please do not hesitate to contact me.

FALSE CLAIMS FOR STATE MONEY OR PROPERTY

Current Situation:

The current review of state contracting practices by the Governor's Task Force on Contract Reform will surely result in the strengthening of checks and balances on the process. However, the sheer multitude of contracts for construction, goods and services into which the state enters every year and the inability to provide airtight review of each and every contract invites an abuse of the process by some contractors, who submit false claims for payments or make material misrepresentations in the bidding process.

Problem:

Based on the experience of the federal government and several sister states, Connecticut may be missing an opportunity to recoup a significant amount of money lost through false claims submitted by contractors. This may be a significant drain on taxpayer dollars. While fraudulent conduct may be known to individuals who work for the contractor or are otherwise involved in the contract process, there is no incentive for such individuals to come forward.

Cause of Problem:

There are limited means by which the state can learn of fraudulent claims by private contractors. There is no efficient legal procedure by which the state can recover money or property improperly obtained from it by contractors and providers of goods and services.

Recommendations for improvement:

- Adopt legislation for a state False Claims Act to impose civil liability on any person or entity who submits or causes the submission of a false claim for state money or property. The Act should be modeled on the false claims statutes enacted by the federal government and several of the states, including California, Illinois, Delaware and Massachusetts.
- A False Claims Act should be comprehensive enough to cover (1) any request or demand for money or property or services; (2) withholding of information in order to cause the state to excuse the individual from making a payment or providing goods or services that the individual would otherwise have to make or provide; (3) kickbacks or bribes that are included in an individual's otherwise legitimate claim for payment, and (4) material misrepresentations.
- Allow an individual who has first-hand knowledge of fraud to initiate a lawsuit under the False Claims Act for recovery of state money or property.
- Provide for coordination between the Attorney General and the Chief State's Attorney in the review of all false claims allegations and lawsuits filed by private individuals.
- The state should have the authority to take over a false claims lawsuit from the private individual and become the primary plaintiff. The state should also be able to initiate a false claims suit.
- Provide both the Attorney General and the Chief State's Attorney with subpoena power to investigate allegations of false claims.
- Exempt false claims suits from the strictures of double jeopardy and

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collateral estoppel in order to permit, where appropriate, both criminal and civil actions for the same unlawful conduct.

- Provide for an award of treble damages in a false claim suit in addition to a monetary penalty.
- Provide for a percentage of the damages recovered to be awarded to the private individual who initiated the suit. In addition, the individual should be reimbursed for costs and attorney's fees. The state should also be awarded costs.
- A portion of the damages awarded should go to the state to be put in a fund for future prosecution of false claims cases.
- Allow the courts to assess legal fees against any individual who brings a frivolous false claims suit.
- Enact a criminal false claims statute modeled on the federal law (18 U.S.C.A. § 287) to impose criminal liability on those who intentionally seek to defraud the state by submitting false claims. Provide the Chief State's Attorney with subpoena power to investigate such criminal conduct.
- Add a section to the prequalification process requiring contractors to disclose findings against them of civil or criminal liability under the false claims acts of any state or the federal government. Provide for a ban on future contracts with Connecticut agencies where a contractor has been held liable for filing a false claim.
- Provide sufficient personnel and financial resources for the Office of the Attorney General and the Office of the Chief State's Attorney to handle False Claims matters.

Statutory changes required:

Enact a False Claims Act and a criminal False Claims statute incorporating the recommendations for improvement set out above.

THE WHISTLEBLOWER STATUTE

Current Situation:

General Statutes § 4-61dd, commonly known as “the whistleblower statute” was first enacted in 1979 and has been amended several times since. The statute provides for initial review of whistleblower complaints by the Auditors of Public Accounts, who then forward the complaint to the Attorney General for review and appropriate action. If the Attorney General believes there is criminal conduct, the complaint may be referred to the Chief State’s Attorney. The state auditors received 99 complaints against 36 public and quasi-public agencies in fiscal year 2002-03.

Problem:

The current statutory language has been interpreted narrowly to limit the scope of investigations into whistleblower complaints. Whistleblower complaints may not be dealt with in a timely manner. Under the current statutory scheme—that the initial investigation be done by the Auditors who then refer it to the Attorney General, who may subsequently refer the complaint to the Chief State’s Attorney—is cumbersome and inefficient. In this scenario, the statute of limitations on certain criminal offenses may have run by the time the matter is referred to the Chief State’s Attorney. The Auditors and the Attorney General perform a civil review of the complaint. A criminal investigation could be jeopardized by the preliminary civil investigations required under the present statutory scheme. While the Attorney General has subpoena power to investigate whistleblower complaints, the Chief State’s Attorney has no subpoena power to investigate whistleblower complaints that are referred from the Attorney General. Whistleblowers are not adequately protected from retaliatory legal action.

Cause of Problem:

There is unclear and/or insufficient statutory authority to broaden the scope of investigation beyond the original allegations in the whistleblower’s complaint. There are insufficient investigatory tools to adequately address whistleblower complaints.

Recommendations for improvement:

Amend the whistleblower statute (§ 4-61dd) to:

- require that the Auditors promptly refer all whistleblower complaints to both the Attorney General and the Chief State’s Attorney; and, where the Auditors have performed an investigation, to report their findings and any recommendations as well.
- direct the Auditors of Public Accounts, the Attorney General and the Chief State’s Attorney to establish a protocol to coordinate and prioritize their investigations;
- permit the Attorney General and the Chief State’s Attorney to conduct investigations into whistleblower complaints with the same powers and authority, including subpoena power;
- permit the Attorney General and the Chief State’s Attorney to expand the scope of investigations into whistleblower complaints beyond the allegations or information transmitted in the complaint when appropriate based on facts discovered during the investigation;

THE WHISTLEBLOWER STATUTE

- provide immunity from civil actions for whistleblower complaints made in good faith;
- examine whether other protections should be available for those filing whistleblower complaints; and
- provide sufficient personnel and financial resources for the Office of the Attorney General and the Office of the Chief State's Attorney to handle whistleblower complaints.

Statutory changes required: Amend C.G.S. § 4-61dd to reflect the above recommendations.

DISQUALIFICATION AND/OR SUSPENSION OF CONTRACTORS

Current Situation:

There are a variety of statutes that cover the disqualification of contractors seeking public contracts. It seems that these statutes are rarely used, but provide adequate deterrence and procedures when needed. State agencies do however prohibit unqualified contractors from obtaining state contracts by exercising their authority to make a responsibility determination prior to the awarding of a contract. This determination is made during the selection process by the contracting agency with the assistance of the Office of the Attorney General and applies only to the contract at issue. A prequalification of contractors prior to bidding was established in Public Act 03-215, as amended by Public Act 04-141. This system begins October 1, 2004, and will be administered by the Department of Administrative Services. The law requires that certain contractors prequalify to bid on public building construction contracts estimated to cost more than \$500,000.

Problem:

The prequalification system administered by the Department of Administrative Services has limited applicability. It does not apply to subcontractors unless they are in a prime contract relationship with the state. It does not apply to projects by quasi-public agencies and all state units of higher education. Under the existing prequalification system, a subcontractor that cannot meet the prequalification standards to work as a prime contractor can still work on state projects under a prequalified general contractor. A general contractor that cannot meet the prequalification standards under the Department of Administrative Services may be able to compete for state building construction contracts exempted by statute with a higher education unit or a quasi-public agency. In regards to disqualifying a contractor from a specific contract, there are no uniform procedures that agencies must follow for determining that a contractor is responsible and qualified. This situation can create confusion for those seeking and those administering contracts. In addition, several procurement-related statutes do not mandate that contracts which are entered into illegally are automatically voidable. This may result in protracted litigation and costs to the state to terminate an illegal contract.

Cause of Problem:

There is unclear and/or insufficient statutory authority and administrative procedures.

Recommendations for improvement:

- The State's Prequalification System, administered by the Department of Administrative Services, should be amended to apply to all state building project subcontractors and to all state building projects including those by quasi-public agencies and all state units of higher education. This recommendation should be phased in over a one year period.
- The application for the Department of Administrative Services' Prequalification System should include the requirement that applicants disclose any suspensions, disciplinary action and/or civil actions taken against the applicant by any federal or state agency or local government. This language should be developed with the assistance of and reviewed by the Office of the Attorney General.
- Uniform procedures for contractor responsibility determinations should be developed by all state contracting agencies in consultation with the

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Department of Administrative Services and the Office of the Attorney General. These procedures should be published by each agency and should include procedures for protest. These procedures should also be reviewed for compliance by an oversight board. Agencies should review and consider the Department of Transportation's Bidding and Award Manual when formulating their procedures.

- All procurement related statutes should be amended to mandate that contracts entered into in violation of state statutes and/or regulations shall be voidable.
- An ethics in government training program for all state employees and state vendors should be developed in conjunction with the State Ethics Commission and distributed to all agencies.
- Every state agency shall designate an individual as the ethics officer. That person shall be responsible for coordinating all ethics training within that agency and ensuring that each employee of that agency completes ethics training. The Department of Administrative Services, in conjunction with the State Ethics Commission, shall be responsible for providing ethics training to potential vendors as a requirement of the Prequalification System.

Statutory changes required:

Amend Contractor Prequalification System administered by Department of Administrative Services enabling legislation to reflect the above changes.

OVERSIGHT REVIEW BOARD

<i>Current Situation:</i>	As presently constituted, the State's existing oversight review board, the State Properties Review Board (SPRB), has limited jurisdiction and inadequate resources.
<i>Problem:</i>	The result is limited independent review of critical State contracts for (1) legal sufficiency, (2) integrity in the contractor/vendor selection process (3) cost effectiveness/fiscal prudence, and (4) conflicts of interest.
<i>Cause of Problem:</i>	Currently, the SPRB's limited jurisdiction and resources do not allow it to review State contracts other than in the finite area of real estate acquisitions, including the sale or lease of property, as well as approval of consultants and consulting contracts for the Department of Public Works.
<i>Recommendations for improvement:</i>	<ul style="list-style-type: none">• Expand SPRB's jurisdiction to include all State agencies, quasi-public agencies and all units of the state higher education system.• SPRB's expanded jurisdiction should be limited to the following areas:<ul style="list-style-type: none">- all State agencies that enter into contracts where there is no independent oversight or review by third parties such as the Federal Highway Administration- potential problem areas such as (1) sole source contracts or (2) non-competitively bid contracts greater than \$500,000.00 in the aggregate and with a duration longer than one year- SPRB should be allowed to expand its current staff to meet the needs of its expanded jurisdiction.
<i>Statutory changes required:</i>	Amend C.G.S. § 4b-3 to reflect the above changes.

ADDITIONAL ISSUES

The Working Group has the following general recommendations for consideration by the Task Force:

- Each agency should establish a sign-off procedure on all awarded state contracts. This procedure should include the signature and/or initials of all individuals that have reviewed the contract. A copy of this documentation shall be kept with the contract and shall be disclosed under any Freedom of Information request regarding the contract.
- A training program on state procurement should be developed. All state employees involved in the procurement process should be required to attend this training. Training up-dates for all state employees involved in the procurement process should be conducted at regular intervals.
- Any recommendation made by the Task Force must be accompanied by the appropriate funding and agency staffing additions to properly address the issue.
- After the Task Force has submitted its recommendations to the Governor on September 1st, a working group comprised of members of the Task Force should be formed to monitor the implementation of any of the Task Force's Recommendation. This working group should issue a one year status report to the Governor by October 1, 2005.